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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 825

W. H. DUDGEON, ET AL., PETITIONERS

v.

INTERSTATE COMMERCE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE INTERSTATE COMMERCE COMMISSION IN OPPOSITION

OPINIONS BELOW

The court of appeals rendered no opinion. The findings of fact, conclusions of law and judgments of the district court (Pet. 15–32) are unreported.

JURISDICTION

The judgments of the court of appeals were entered on November 16, 1962 (Pet. 13–14), and the petition for a writ of certiorari was filed on February 14, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the courts below correctly found that the drive-away operations conducted by petitioners con-

stitute for-hire transportation of automobiles in interstate commerce, for which operating authority must be obtained from the Interstate Commerce Commission.

STATUTE INVOLVED

Section 203(c) of the Interstate Commerce Act, 49 U.S.C. 303(c), provides:

> Except as provided in section 202(c), section 203(b), in the exception in section 203(a)(14), and in the second proviso in section 206(a)(1), no person shall engage in any for-hire transportation business by motor vehicle, in interstate or foreign commerce, on any public highway or within any reservation under the exclusive jurisdiction of the United States, unless there is in force with respect to such person a certificate or a permit issued by the Commission authorizing such transportation, * * *.

Other relevant sections of the Interstate Commerce Act are set forth at pages 3 and 4 of the petition.

STATEMENT

This proceeding was instituted in the United States District Court for the Southern District of California by the Interstate Commerce Commission, pursuant to Section 222(b) of the Interstate Commerce Act (49 U.S.C. 322(b)), to enjoin the two petitioners from engaging in interstate for-hire transportation of automobiles without a certificate of public convenience and necessity issued by the Commission. Petitioners admitted that they were engaged in the operations described in the complaint, but denied that such operations constitute for-hire transportation. The district court held that each petitioner was engaged in for-hire

transportation by motor vehicle within the meaning of Section 206(a) of the Interstate Commerce Act, and enjoined if from doing so without Commission authority. The court of appeals summarily affirmed (Pet. 13–14).

There is no dispute as to the facts.[1] The operations of the two petitioners are substantially the same. Both maintain offices in Los Angeles, California, from which they conduct businesses known respectively as All States Drive-Aways Agency and Nation-Wide Drive Away Agency, Inc. They solicit the general public through advertisements in the local newspapers and in the Los Angeles telephone directory. Typical advertisements are: "Automobile delivery service to anywhere in the United States"; "Car Delivered Anywhere"; and "Ship Your Car Anywhere". (Pet. 16, 25).

Persons who wish to have their automobiles transported from Los Angeles to other points in the United States contact petitioners, who arrange for a driver to transport the car to its destination. Neither petitioner maintains a regular staff of drivers, but both maintain "lists of available drivers" (Pet. 18, 26). Petitioners "screen" prospective drivers, require them to furnish references, and inquire into their past driving experiences (Pet. 18, 26–27). Normally the driver does not meet the owner of the car until he delivers the car to its destination (Pet. 18, 27).

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[1] Both cases were submitted to the court upon agreed statements of facts as contained in the pre-trial orders, and certain additional evidence adduced at the trial (Pet. 15, 24).

Both petitioners utilize similar standard forms and contracts prepared by them in advance. Both use a driver's application form. All-States also uses a contract with the owner, which states that the owner releases the car to All-States "for the purpose of selecting a reliable driver," and a lease agreement by which All-States, as "agent" for the owner, "leases" the car to the driver for the duration of the trip (Pet. 16–17). Nation-Wide's formal agreements consist of an order form, signed by the owner, which identifies the owner, car, and destination point, and a driver's agreement which purports to make the driver an "independent contractor" who contracts with the owner "for the sole purpose of delivery" of the vehicle (Pet. 25, 26).

Through the foregoing agreements, the petitioners prescribe the route and number of miles to be traveled, the date of delivery, the number of passengers who may be transported, and the responsibility for payment of such items as gasoline, oil, and minor repair bills. Although petitioners provide no personal injury or property insurance, they assume responsibility for the first $50 in damages to the car and instruct the owner, in the event of complaint, to contact petitioners immediately (Pet. 17, 19, 25–26, 28).

Petitioners collect a fee based on the distance to be traveled. A $50 deposit, which they require of the driver, is paid by the owner to the driver at destination, and the remainder of the fee is paid by the owner at the time the original agreement is made (Pet. 18–19, 27).

ARGUMENT

Section 206(a) of the Interstate Commerce Act prohibits common carriers by motor vehicle from engaging in interstate operation on a public highway without a certificate of public convenience and necessity issued by the Commission, and Section 203(c) prohibits engaging in "any for-hire transportation business by motor vehicle" in interstate commerce without Commission authorization. Section 203(a)(14) defines a "common carrier" as any person which holds itself out to the general public to engage in the transportation by motor vehicle in interstate commerce of persons or property. Almost from the inception of federal motor carrier regulation the Commission has construed these provisions as covering for-hire transportation of automobiles by so-called "driveaway" service, and has issued certificates and permits authorizing such transportation.[2] This Court implicitly recognized the validity of Commission regulation of such service in *Alton Railroad Co.* v. *United States*, 315 U.S. 15, and the holding below that such service constitutes for-hire transportation accords with the decisions of the two other district courts that have considered the issue.[3] As one of those courts

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[2] *E.g.*, *Lord Contract Carrier Application*, 34 M.C.C. 549 (1942); *Kenosha Auto Transport Corp., Common Carrier Application*, 24 M.C.C. 753 (1940); *Howard Sober, Inc., Extension*, 23 M.C.C. 80 (1940); *Fleming Contract Carrier Application*, 8 M.C.C. 469 (1938), affirmed, *sub nom. Alton R. Co.* v. *United States*, 314 U.S. 15 (1942); *D. L. Wartena, Inc., Common Carrier Application*, 4 M.C.C. 619 (1938).

[3] *United States* v. *Aides, Inc.*, 211 F. Supp. 122 (E.D. Pa.); *Interstate Commerce Commission* v. *Interstate Auto Shippers, Inc.*, Civil No. 3101, S.D. N.Y., decided February 7, 1963. The

recently explained, "a person who, continuously, as a business, arranges for, obtains or provides a driver to transport a vehicle, owned by another, in driveaway service, has assumed the characteristic burdens of the transportation business."[4] See *United States* v. *Drum*, 368 U.S. 370, 375. To deny the Commission regulatory authority over such transportation would not only cause the "diversions of traffic which may harm existing carriers" about which Congress was concerned in the Motor Carrier Act (*Drum, supra*), but could also lead to serious evasions of the safety requirements which the Commission imposes on regulated motor carriers.

Petitioners contend (Pet. 10) that "in the conduct of their auto drive-away businesses, they act only as an intermediary bringing together the private automobile owners and drivers and do not provide a transportation service." The district court's findings, which are not here challenged, refute this contention. The court found, among other things, that petitioners' advertisements constitute the holding out of an automobile transportation service (Pet. 21, 30); that the automobile owner turns his property over to petitioners for the purpose of having it delivered to its destination, and pays petitioners a charge based upon the distance to be traveled (Pet. 21, 30); that the terms and conditions of such transportation are prescribed by petitioners, and the contracts and agree-

latter decision, which is not yet reported, is set forth in the Appendix, *infra*.

[4] *Interstate Commerce Commission* v. *Interstate Auto Shippers, Inc.*, *supra*, n. 3, App. *infra*, p. 17.

ments signed by both owner and driver are prepared by petitioners (Pet. 21, 30); that drivers are selected by petitioners, receive their instructions from petitioners, and look to them as employers (Pet. 22, 30); and that, insofar as any individual trip is concerned, the driver is in fact an agent of petitioners and under their supervision and control (Pet. 22, 31). The findings fully support the district court's conclusion that petitioners perform "substantially all the functions of transporting automobiles" (Pet. 22, 31), and hence are subject to the certificate and permit requirements of the Act.[5]

Contrary to petitioners' argument (Pet. 10), the district court properly "discounted the form of the petitioners' procedures" and considered the "true substance of the transaction" in determining whether petitioners had engaged in for-hire transportation. The claim of the petitioners that "the driver's authority to drive the owner's vehicle was derived from the direct contract between the owner and driver and that the petitioners maintained no control over the driver's operation of the vehicle once the trip had commenced"

[5] There is plainly no conflict with *B & C Truck Leasing, Inc.* v. *Interstate Commerce Commission*, 283 F. 2d 163, 165 (C.A. 10). The court there stated, by way of dictum, that "one engaged solely in furnishing drivers to drive trucks for others in the transportation of their own property on the highways, without more, is not required to obtain a certificate of convenience and necessity." In the present case, as the discussion in the text demonstrates, petitioners have not been "engaged solely in furnishing drivers," but have been engaged in the "holding out of an automobile transportation service" (Pet. 21, 30).

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(Pet. 10) cannot prevail over the real substance of what they are doing. See *United States* v. *Drum*, 368 U.S. 370; *Georgia Truck System, Inc.* v. *Interstate Commerce Commission*, 123 F. 2d 210 (C.A. 5). The district court was justified in concluding, as have other courts[6] and the Commission[7] in holding operations conducted pursuant to similar formal arrangements to constitute for-hire transportation, that "[t]he documents, agreements and contracts utilized by defendant appear to be designed to avoid the application of the provisions of the Interstate Commerce Act to the transportation performed and they are of no legal effect wherein the terms are in contradiction to the facts" (Pet. 20–21, 29).

In sum, this case involves only the correctness of the application of the statutory standards to the particular facts here involved. The courts below correctly held that petitioners' driveaway operations constituted for-hire transportation, and there is no occasion for further review of those essentially factual determinations.

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[6] See note 3, *supra*, p. 5.

[7] *Service Associates, Inc., Investigation of Operations*, 89 M.C.C. 33 (1962); *Fred D. Spencer, Investigation of Operations*, 88 M.C.C. 243 (1961), appeal pending, Civil Action No. C62–422, N.D. Ohio; *AA Auto Delivery, Inc., Common Carrier Application*, 77 M.C.C. 365 (1958); *Automotive Shippers, Inc., Common Carrier Application*, 64 M.C.C. 475 (1955).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.

ROBERT W. GINNANE,
General Counsel,
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Regional Attorney,
Interstate Commerce Commission.

MARCH 1963.

APPENDIX

In the United States District Court of the Southern District of New York

62 CIVIL 3101

INTERSTATE COMMERCE COMMISSION, PLAINTIFF,

v.

INTERSTATE AUTO SHIPPERS, INC. AND ALFRED M. RAPPEPORT, DEFENDANTS.

OPINION, FINDINGS OF FACT AND CONCLUSIONS OF LAW.

Appearances: Seymour Glanzer, Larsh B. Mewhinney, Attorneys for Plaintiff, Interstate Commerce Commission, 346 Broadway, New York, N.Y. H. Howard Friedman, Attorney for Defendants, 295 Madison Avenue, New York, N.Y.

LEVET, *D.J.*: This is a motion for a preliminary injunction whereby the plaintiff seeks to restrain the defendants from transporting property in interstate commerce as a common carrier by motor vehicle in violation of Section 206(a) of the Interstate Commerce Act (49 USC § 306(a)). Following service of a verified complaint and verified answer, the plaintiff, by order to show cause, brought on an application for a temporary restraining order. This court conducted a hearing on plaintiff's application and evidence was adduced.

The proposed findings of fact, conclusions of law and briefs of the parties having been received, the court, after considering the pleadings, evidence, ex-

hibits and the stipulation of the parties, now makes and files herein its Findings of Fact and Conclusions of Law, separately stated:

FINDINGS OF FACT

1. The defendant corporation, of which the individual defendant is the president and sole stockholder, maintains an office and place of business in the City and County of New York, New York, within the jurisdiction of this court.

2. From sometime in 1958 to the present the defendants have been engaged in the "driveaway" business in interstate commerce.

3. "Driveaway" is a service sought by owners of automobiles, traveling to a given destination by another mode of transportation, who wish their cars delivered to that destination.

4. The defendants advertise their business to the general public in the Manhattan Yellow Pages and in The New York Times (Pl. Exs. 3 and 4 and Exs. 3, 4 and 5 attached to Clark's affidavit in Pl. Ex. 7). The Yellow Pages advertisement is contained under the heading of "automobile transporting." A quarter page advertisement holds out "Agents in Principal Cities of U.S.A.." "Insurance Arranged Drivers' Bonds Posted." "Ship Your Car at Low Rates Nationwide & Overseas Via Steamer-Rail-Driveaway." The Commercial Notice Section of The New York Times contains the following sample: "Reliable drivers, Florida, Tucson, Denver, Chicago. Immediate."

5. In response to advertising or through word of mouth, those persons who wish their automobiles delivered to nationwide destination points via "driveaway" service communicate with the defendants. If the terms and arrangements are satisfactory, car

owners enter into a series of written agreements with the defendants on printed forms provided by the defendants. While the circumstances may vary slightly depending on the car owner's needs, the transaction involving the shipment of an automobile owned by one Michael Nastacio is representative of all.

Nastacio sought to have his car transported from Brooklyn, New York to Colorado Springs, Colorado. On October 26, 1960 he entered into a driveaway agreement (Ex. 6 attached to Pl. Ex. 7) with the defendants. By its terms the defendants are authorized to act as agents for Nastacio to engage a driver for him and to deliver the automobile to destination. The agreement sets forth certain instructions to be given the driver by the defendants, including such items as the routes to be traveled, notification in case of accident, and authorization that the driver is to retain possession of the vehicle until he receives payment of the balance of delivery charges. In the event of accident the defendants agree to pay up to $50.00, if the car owner carries a collision insurance policy. Nastacio paid the defendants $115.00 on entering into the driveaway agreement.

Thereupon, on October 28, 1960, the defendants entered into a Driver Agreement with one Edward Bonville, to deliver Nastacio's car to destination. (Ex. 7 attached to Pl. Ex. 7) The agreement is signed by defendant Alfred M. Rappeport, as dispatcher for the corporate defendant. It sets forth the routes to be traveled, time allowed for delivery and defines the driver's duties and responsibility. The driver agrees to deposit $50.00 as a "bond" to be refunded upon delivery of the car, but which may be forfeited due to driver's negligence. The driver is required to telephone the defendants in case of accident or major service and await further instructions.

After the allowed time for delivery has elapsed, the defendants are permitted to take all steps necessary to recover the vehicle and the driver may forfeit his "bond."

Upon entering into the driver agreement, Rappeport and the driver signed a form entitled "Temporary In Transit Authorization", which had previously been signed by the car owner. (Pl. Ex. 5) Simultaneously, Bonville was given a post-dated check drawn by the defendants, in the sum of $50.00, as a return of his "bond" deposit.

6. On March 9, 1959, District Supervisor Tomany, plaintiff's representative, advised defendants, in writing, that its activities were those of an interstate motor common carrier of property for compensation and required authority from the Commission. (Ex. 1 attached to Pl. Ex. 7) On March 11, 1959, Mr. Rappeport advised the supervisor that he would apply to the Commission for authority and until such authority was granted he would cease all driveaway activties. On March 16, 1959, Mr. Rappeport wrote to Mr. Tomany in partial confirmation of the advice given the supervisor at the conference. (Ex. 2 attached to Pl. Ex. 7) For at least two weeks thereafter the defendants ceased to advertise their driveaway business in New York newspapers. However, Mr. Rappeport testified that the defendants never terminated their driveaway operations.

7. Rappeport testified that during 1962 the defendants entered into about 1,500 "driveaway" agreements, of which a substantial number involved interstate transactions. In many instances, unlike the Nastacio "driveaway," the car owner did not pay the entire fee in advance. On those occasions the defendants collected the difference between the agreed-upon fee and the "bond" to be deposited by the driver.

When the car was delivered, the owner would reimburse the driver in the amount of his "bond" and the defendants would retain the bond. For example, the usual fee for "driveaway" from New York City to Miami, Florida is $75.00. The owner pays $25.00 in advance to the defendants and the driver deposits $50.00 with the defendants. Upon delivery, the owner pays the driver $50.00 and the defendants retain the "bond" deposit.

8. The defendants will continue to engage in the "driveaway" business in interstate commerce without there being in force and effect a certificate of public convenience and necessity authorizing them or either of them to conduct such operations, unless restrained by this court.

DISCUSSION

The plaintiff contends that the "driveaway" operations conducted by the defendants are those of a "common carrier by motor vehicle" as defined in Section 203(a)(14) of the Interstate Commerce Act (49 USC 303(a)(14)) and that under the provisions of Section 206(a)(1) of said Act (49 USC 306 (a)(1)), no common carrier by motor vehicle shall engage in any interstate or foreign operations unless there is in force and effect a certificate of public convenience and necessity issued by the Interstate Commerce Commission authorizing such operations. Neither defendant has been issued any authority by the Commission.

The defendants contend they are not engaged in the business of transportation of property by motor vehicle but that their business is of such a nature as not to require authority from the plaintiff.

Rappeport claims that the defendants' fee is earned solely for "screening" drivers. The "screening" service consists primarily of photographing and fingerprinting drivers, examining identification and

being furnished with references. In order to secure drivers, the defendants advertise in the newspapers (Pl. Ex. 6) or rely upon drivers seeing their "driveaway" advertisement in the Yellow Pages. Sometimes the driver is not introduced to the owner and has had no dealing with the owner until delivery at destination. On other occasions, at the owner's request, the defendants introduce the driver to the owner.

Although Rappeport claims the defendants' fee is solely for "screening," it is noted that the fee varies in accordance with the distance to be traveled. The New York to Miami fee is about $75.00; the New York to Colorado fee was $115.00 in the Nastacio transaction; and the New York to California fee is about $125.00. Rappeport stated that the fee is determined on the basis of competitive rates and is maintained at about one-fifth that of carriers holding authority issued by the Commission.

Defendants also claim they are exempt from certification by reason of Title 49 USC § 303(b)(9) Section 303(b)(9) exempts "the casual, occasional, or reciprocal transportation of passengers or property by motor vehicle in interstate or foreign commerce for compensation by any person not engaged in transportation by motor vehicle as a regular occupation or business * * *."

The claim of exemption is without merit. The exemption of Section 303(b)(9) does not apply here because of the repetitious nature of defendants' operations. *MC116023 AA Auto Delivery Inc., Common Carrier Application* 77 M.C.C. 365. See also *Automobile Shippers, Inc.*, 64 M.C.C. 457.

Defendants are attempting to hide behind the facade of an employment agency. In a recent case, a court permanently enjoined a defendant from oper-

ating its "driveaway" service until it was certified. *Interstate Commerce Commission* v. *W. H. Dudgeon, d/b/a All States Drive-Aways Agency* (D.C. S.D. Calif.), aff'd without opinion, 9 Cir., November 16, 1962. In *Dudgeon,* many of the issues presented here were resolved in favor of the Commission. Since the present case is substantially identical with *Dudgeon,* this court is warranted in granting a preliminary injunction at this time.

CONCLUSIONS OF LAW

1. This court has jurisdiction over the subject matter and of the defendants under the provisions of Section 222(b) of the Interstate Commerce Act (49 U.S.C. 322(b)) and Section 2 of the Elkins Act (49 U.S.C. 42).

2. Part II of the Interstate Commerce Act is a highly remedial statute and its terms are broadly comprehensive enough to bring within them all of those who, no matter what form they use, are in substance engaged in the business of transportation of property on the public highways for hire. *Georgia Truck System, Inc.* v. *Interstate Commerce Commission,* 5 Cir. 1941, 123 F. 2d 210. The Act being a remedial statute, it should be liberally interpreted to effect its evident purpose. *McDonald* v. *Thompson,* 305 U.S. 263 (1938); *Piedmont and N. Ry. Co.* v. *Interstate Commerce Commission,* 286 U.S. 299 (1931).

3. The documents, agreements and contracts utilized by defendants appear to be designed to avoid the application of the provisions of the Interstate Commerce Act to the transportation performed and are not binding upon this court. The driveaway agreement employed by defendants wherein defendants become the car owner's agent to obtain a driver

for the trip to destination is not a bona fide agency, but is a mere subterfuge under the guise of which defendants attempt to conceal their unlawful operations.

4. The advertisements of the defendants constitute a holding out of an automobile transportation service within the meaning of Section 203(a)(14) of the Interstate Commerce Act, Part II (49 USC 303(a)(14)).

5. For each automobile transported the defendants charge and receive a definite sum of money from the owner thereof, and the receipt of such money is compensation within the meaning of Part II of the Interstate Commerce Act.

6. The test to be applied to determine whether the defendants' operations are subject to the certificate provisions of Section 206(a) of the Act (49 USC 306(a)) is whether the defendants have assumed in significant measure the characteristic burdens of the transportation business. *United States* v. *Drum*, 368 U.S. 370 (1961). The clear import of the Commission's decision in *MC116023 AA Auto Delivery, Inc. Common Carrier Application*, 77 M.C.C. 365 is that a person who, continuously, as a business, arranges for, obtains or provides a driver to transport a vehicle, owned by another, in driveaway service, has assumed the characteristic burdens of the transportation business. The defendants have assumed the characteristic burdens of the transportation business in the transportation of automobiles, in driveaway service, in interstate commerce for compensation, and are a common carrier by motor vehicle as defined in Section 203(a)(14) of the Act (49 USC 303 (a)(14)).

7. The acts of the defendants constitute violations of Section 206(a) of the Interstate Commerce Act (49 USC 306(a)) and as such are subject to be en-

joined by this court under the express provisions of Section 222(b) of said Act (49 USC 322(b)).

8. The Interstate Commerce Commission, therefore, is entitled to a preliminary injunction enjoining defendants from violating Section 206(a) of the Interstate Commerce Act (49 USC 306(a)).

Settle order on notice in accordance with Rule 65(d) of the Federal Rules of Civil Procedure.

Dated: New York, N.Y., February 7, 1963.

United States District Judge.

U.S. GOVERNMENT PRINTING OFFICE: 1963